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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **FLOYD JACKSON,** **Defendant and Appellant.**	**A134869** **(Alameda County Super. Ct. No. H-51124)**

Appellant Floyd Jackson was convicted after a jury trial of attempted murder (Pen. Code, §§ 187, subd. (a), 664) and possession of a firearm by a felon (*id.*, former § 12021, subd. (a)(1)).[1] He contends (1) his trial counsel was ineffective, (2) the trial court failed to instruct the jury on a lesser included offense, and (3) the sentence for the possession of a firearm by a felon conviction should have been stayed pursuant to section 654. We reject appellant's contentions and affirm.

BACKGROUND

The relevant evidence at trial was as follows. In the early morning hours of September 10, 2011, Angelique Payton was asleep in her home with appellant, her then boyfriend.[2] Around 6:00 a.m., Payton's ex-boyfriend, Torrance Mackey, woke her by

[1] All undesignated section references are to the Penal Code.

[2] Payton did not testify at trial, but her testimony from the preliminary hearing was read into the record.

throwing rocks at her bedroom window. Payton told appellant to let her talk to Mackey, but appellant pushed her out of the way and left the bedroom. Payton saw a gun in appellant's pocket as he left.

Payton's son, Raymon Hill, was awakened around 6:00 a.m. that morning by the sound of Payton and appellant arguing in Payton's bedroom.[3] He heard a gun "cocked" and then saw appellant leave Payton's bedroom with a gun in his hand. Watching from inside the front door, Hill saw appellant and Mackey talking for about five minutes. He heard Mackey ask appellant, "You going to bust me?" which Hill understood to mean "You gonna shoot me?" Hill could not hear appellant's response. Mackey turned around and began to walk toward his vehicle. Hill then closed the front door and began to walk upstairs; while he was on the stairs, he heard gunshots. He ran outside and saw Mackey lying on his stomach under his vehicle. Appellant was gone.

Mackey testified that he got into an argument after appearing at Payton's house on the morning in question. Mackey did not have a weapon with him. He did not recognize appellant as the man with whom he argued, and did not remember many details about the argument because he "kind of blacked out." However, he did remember getting shot from behind as he was walking towards his car.

A crime scene investigator and expert in firearm trajectory found seven cartridge casings at the scene of the shooting. He also found six "bullet strikes" in the asphalt near Mackey's vehicle — indentations indicating a bullet had hit the street at that location. There was no evidence that more than one shooter had been involved in the shooting.

The doctor who initially treated Mackey found five "missile" wounds: "through and through" injuries to his shoulder, arm, and thigh; and wounds on his buttocks and his knee. Bullets or bullet fragments were found above Mackey's knee and in his thigh. The doctor could not tell whether the buttocks wound was caused by a bullet or something else.

Appellant did not testify or present any other witness in his defense.

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[3] Hill did not testify at trial, but his testimony from the preliminary hearing was read into the record.

The trial court sentenced appellant to an aggregate term of 50 years four months to life. Sixteen months of this sentence was imposed as a consecutive term for the possession of firearm by a felon conviction.

DISCUSSION

I. *Ineffective Assistance of Counsel*

Appellant contends his trial counsel was ineffective for failing, in his closing statement, to argue certain evidence supported a conviction for assault with a firearm rather than attempted murder.[4]

The thrust of trial counsel's closing argument was the prosecution had not proved intent to kill. He portrayed Mackey as the aggressor and argued appellant was simply reacting, perhaps thinking Mackey had a weapon. Trial counsel argued the evidence showed Mackey was neither shot in the back nor shot while lying on the ground. This evidence, trial counsel suggested, was inconsistent with attempted murder: "Face-to-face, not with my back to you. And if you know nothing else, that's all you need to decide this case one way or the other. Was it an attempt to kill somebody who is apparently laying helpless on the ground and I walk away from you or is this an assault? And those are the choices you're going to have to make. Is this an assault or is this an attempted murder?"

Appellant argues trial counsel's closing statement was ineffective because it did not formulate an argument based on certain ballistics evidence. According to appellant, trial counsel should have argued the six bullet strikes found on the street could only be the result of a gun fired directly at the ground because (1) only seven casings were found and therefore only seven bullets were fired; (2) the bullets either remained in Mackey's body and therefore did not subsequently strike the ground, or hit his upper body and therefore were not likely to then strike the ground nearby; and (3) any bullets fired at

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[4] The jury was instructed, at appellant's request and with the prosecution's consent, that assault was a lesser included offense to the charge of attempted murder. The People point out assault is not in fact a lesser included offense and argue appellant therefore suffered no prejudice from any failure by trial counsel to argue for it. In light of our conclusion that appellant has not demonstrated deficient performance, we need not resolve this issue.

Mackey while he was lying down would likely have remained under his body and no such bullets were found. Appellant contends counsel should have argued this evidence shows Mackey's wounds resulted from bullets ricocheting off the ground and therefore appellant had no intent to kill.

The California Supreme Court has "repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citation.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) "[D]eference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. . . . Judicial review of a defense attorney's summation is therefore highly deferential . . . ." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 6 (*Yarborough*).)

Appellant's trial counsel was not asked to explain why in his closing statement he did not make the above argument. We cannot say there could be no satisfactory explanation. Trial counsel may have considered the argument posited by appellant and concluded it was weak or would confuse the jury. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." (*Yarborough*, *supra*, 540 U.S. at p. 8.) Accordingly, we reject appellant's claim.[5]

II. *Sua Sponte Instruction on Lesser Included Charge*

Appellant argues the trial court erred in failing to instruct the jury sua sponte on attempted involuntary manslaughter as a lesser included charge. Appellant concedes California Courts of Appeal have held there is no such crime, but argues those cases were wrongly decided. We disagree.

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5 Appellant has informed the court by letter of his intent to file a petition for writ of habeas corpus on a ground closely related to this claim. We express no opinion here on the merits of any such petition.

"To establish an attempt to commit a crime, two essential elements must be present: (1) a specific intent to commit that crime, and (2) a direct act done towards its commission. [Citations.] . . . Involuntary manslaughter is . . . inherently an unintentional killing. [Citations.] [¶] An 'attempt' to commit involuntary manslaughter would require that the defendant intend to perpetrate an unintentional killing — a logical impossibility." (*People v. Broussard* (1977) 76 Cal.App.3d 193, 197; accord, *People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332; *People v. Brito* (1991) 232 Cal.App.3d 316, 320-322.) This analysis is sound.

Even were we to conclude otherwise, our conclusion would be a departure from settled law at the time of appellant's trial. Where a legal rule is in an "undeveloped state" at the time of trial, "we cannot impose upon the . . . trial court so formidable a duty as to conceive and concoct an instruction embodying that rule. 'The duty of the trial court involves percipience — not omniscience.' [Citations.]" (*People v. Flannel* (1979) 25 Cal.3d 668, 683, superseded by statute on another ground as stated in *In re Christian S.* (1994) 7 Cal.4th 768, 777.) That the trial court did not sua sponte instruct the jury on attempted involuntary manslaughter was not error.

III. *Penal Code Section 654*

Appellant contends the sentence on his conviction for possession of a firearm by a felon should have been stayed pursuant to section 654. Section 654 precludes multiple punishments for a single indivisible course of conduct, in which all of the offenses were incident to one objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Whether section 654 applies in a given case is a question of fact for the trial court, which we must uphold if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

" 'Whether a violation of [the provision regarding felons in possession of firearms] constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence

shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.' [Citation.]" (*People v. Bradford* (1976) 17 Cal.3d 8, 22 (*Bradford*).) "[W]hen an ex-felon commits a crime using a firearm, and arrives at the crime scene already in possession of the firearm, it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1141; accord, *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413; cf. *Bradford*, at pp. 13, 22-23 [§ 654 prohibits weapons possession sentence where the defendant wrested a handgun from an officer during commission of another crime]; *People v. Venegas* (1970) 10 Cal.App.3d 814, 821 [§ 654 prohibits weapons possession sentence where evidence showed possession was "physically simultaneous" and "incidental to" the other crime].)

Both Payton and Hill saw appellant with a gun when he left Payton's bedroom to go speak with Mackey. There was no evidence the gun belonged to anyone other than appellant. There was also no evidence appellant knew Mackey would be coming to Payton's house on the morning in question; in fact, Payton testified she did not talk to appellant about Mackey at all. A trier of fact could thus infer that appellant possessed the gun prior to and separate from his shooting of Mackey. (See *People v. Rosas* (2010) 191 Cal.App.4th 107, 111 [where the defendant was driving around, saw a rival gang member, and shot at him, "the jury could readily and reasonably infer that [the defendant] *already had* a gun with him in the car"].) Accordingly, substantial evidence supports the trial court's determination that section 654 did not preclude appellant's sentence on his conviction for possession of a firearm by a felon.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.